
Preparation:


These articles are still relevant even after the small changes from the “Interim Outline Edition” of the DCFR to the “Outline Edition” (which corresponds to the “Full Edition”).

Read Carlill v. Carbolic Smoke Ball Company [1893] 1 Q.B. 256 (available at Westlaw).


Prepare exercises 1–4.

You are not required to read the works referred to in the footnotes of this outline.

1 National law, choice of law, uniform law, harmonisation

Contract law varies from country to country, also in Europe. Differences not only between common law and civil law countries, but even among civil law countries

When a contract is connected to more than one legal system, choice-of-law rules decide which (substantive) rules govern the contractual relationship. For EU member states, see Regulation 593/2008 on the law applicable to contractual obligations (Rome I)

States may agree on uniform rules on certain types of contract, e.g. CISG (UN Convention on contracts for the international sale of goods)

Harmonisation has different meanings: bringing national rules closer or creating common rules and principles
European Union legislation: regulations may be regarded as uniform legislation; directives as harmonisation instruments

Non-state instruments: Unidroit Principles of International Commercial Contracts. Principles of European Contract Law (PECL); Draft Common Frame of Reference

Some recent and ongoing national reforms: German Schuldrechtsform (from 2001), influence from EU legislation, CISG; new civil codes in several Eastern European countries (e.g. Estonia), influence from EU legislation, CISG, PECL; French avant-projet Catala (law of obligations)

2 Academic projects concerning European private law

During the last thirty years, several academic groups have been working with various aspects of European private law. Some of them will be mentioned here:

The Principles of European Contract Law was prepared by the Commission on European Contract Law (“the Lando Commission”)

The Study Group on a European Civil Code is the successor of the Lando Commission. The Study Group has prepared several volumes of Principles of European Law and more volumes are forthcoming

The Acquis Group “targets a systematic arrangement of existing Community law which will help to elucidate the common structures of the emerging Community private law”. To date, one volume (revised) has been published (in addition to the DCFR)

The Common Core of European Private Law Project (“the Trento Common Core Project”), under the leadership of Ugo Mattei and Mauro Bussani, has completed several comparative studies on European private law

The Academy of European Private Lawyers, (“Gandolfi Project”) based in Pavia, has published a draft European Contract Code, inspired by the Italian Civil Code and a draft

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3 Quoted from www.acquis-group.org.


Contract Code prepared for the Law Commissions of England and Scotland by Harvey McGregor

The European Group on Tort Law (“Tilburg Group”) has drafted Principles of European Tort Law

The Commission on European Family Law conducts research concerning the harmonisation of family law in Europe

The Unidroit Principles of International Commercial Contracts are not limited to Europe; on the other hand they deal with commercial contracts exclusively

3 The Common Frame of Reference – political documents

The European Parliament has repeatedly expressed the need for harmonisation of European private law (or even a European civil code)

The Commission’s “action plan” on “a more coherent European contract law” resulted inter alia in a research project for the preparation of a “common frame of reference” of European contract law (CFR).

Among the participants of the research network (Joint Network on European Private Law (CoPECL)) are the Acquis Group, the Study Group on a European Civil Code, and the Common Core of European Law Project. The DCFR is an academic text – a possible CFR will be prepared by the Commission

4 The Draft Common Frame of Reference – present state

A full version of the Draft Common Frame of Reference was published in October 2009. An interim outline edition (black letter rules only) was submitted to the Commission December

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8 See for publications etc., http://www.ceflonline.net/.


10 See as one of the most recent, resolution 3 September 2008.


2007 by the Study Group on a European Civil Code and the Acquis Group,\textsuperscript{14} and in January 2009, a revised outline version was published

A text which can, to a certain extent, be regarded as an alternative to the DCFR, were published by the Association Henri Capitant and the Société de législation comparé in 2008, including a revision of PECL\textsuperscript{15}

5 \textbf{The DCFR – overview}

The DCFR has the formal outline of a civil code (books, chapters, sections, articles)

Black letter rules, comments with illustrations, comparative notes

Book I General provisions

Book II Contracts and other juridical acts (pre-contractual duties, formation of contract, representation, invalidity, interpretation, etc.)

Book III Obligations and corresponding rights (performance, remedies for non-performance, transfer of rights and obligations, set-off, prescription)

Book IV Specific contracts and the rights and obligations arising from them (sales, leases, services, mandate, commercial agency, franchise and distributorship, loan contracts, personal security, donation)

Book V Benevolent intervention in another’s affairs

Book VI Non-contractual liability arising out of damage caused to another

Book VII Unjustified enrichment

Book VIII Acquisition and loss of ownership in movables

Book IX Proprietary security rights in movable assets

Book X Trusts


6 Character of the DCFR

Purposes: Possible model for a political CFR; legal science, research and education; possible source of inspiration (legislators, courts, parties)

Underlying principles: freedom, security, justice and efficiency

Overriding principles: protection of human rights; promotion of solidarity and social responsibility; preservation of cultural and linguistic diversity; protection and promotion of welfare; promotion of the internal market (and again freedom, security, justice and efficiency)

Definitions (suggestions for the development of a uniform European legal terminology)

Model rules (not necessarily “common core” or “restatement”), a “toolbox”

7 The proposal for a directive on consumer rights

The Commission’s proposal for a directive on consumer rights has not inspired by the contents and terminology of the DCFR

8 Debate concerning the DCFR

8.1 Legitimacy

Is harmonisation of private law within the competence of the EU?

8.2 Is there a need for a Common Frame of Reference?

Does business ask for this instrument? Will national law have to provide for background rules in any case?

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8.3 Is harmonisation possible?
Is it possible to combine common law and civil law?20

8.4 Is harmonisation a threat to cultural (and legal) pluralism?
Law as part of culture.21 The question of language – English as common language?22

8.5 The DCFR and social justice
Market liberalism v. social justice?23

8.6 An optional instrument?
Rules that may be chosen by the parties (today only as a supplement to national law). The “blue button” approach (“click here if you choose the DCFR to apply to our contract”)24

8.7 Is the DCFR a modern contract law instrument?
Is the DCFR too abstract, too "German"?25 Does it reflect modern contract law problems?26 Is it too much based on the approach of national law?27 Does it sufficiently reflect "multi-level governance"?28

Exercise 1:

(Group discussion and presentation in class)

1) In your opinion, which are the three most important arguments in favour of a Common Frame of Reference and which are the three most important arguments against it?

2) What is meant with the expression “optional instrument” in the discussion on the CFR?

9 Existing EC contract law

Most of the existing EC contract law regulation is consumer contract law (some exceptions, e.g. Late Payment Directive 2000/35)

Important directives:


Some of the directives are “vertical” (applying only to one type of contract), while others are “horizontal” (covering certain issues common to all consumer contracts or a larger group of contracts)

Most of the directives imply minimum harmonisation (states are allowed to keep or introduce rules that are more favourable to consumers than the directives do), but the directives on Unfair Commercial Practices and on Consumer Credit are maximum harmonisation directives (neither more favourable nor less favourable rules are allowed concern issues covered by the directives)

A proposal for a new Directive on Consumer Rights (COM(2008) 614 final) was presented in October 2008. This is meant to replace the directives on Doorstep Selling, on Distance Contracts, on Consumer Sales, and on Unfair Contract Terms. It has been called a “horizontal instrument” and is meant to be a maximum harmonisation directive

Information regarding the preparation of the proposal is found here: http://ec.europa.eu/consumers/rights/cons_acquis_en.htm. See in particular the link to the the EU Consumer Law Compendium, which deals with the implementation in national law of the consumer directives

Note also Regulation 593/2008 on the law applicable to contractual obligations (Rome I)

Exercise 2:

(Group discussion and presentation in class)


10 Overview: contract, juridical act, formation of contract, right of withdrawal

“Contract” is defined in DCFR II.–1:101(1) (agreement with legal effect); binding effect of valid contract: DCFR II.–1:103; see definitions in Annex I of “contract” and “contractual relationship”

“Juridical act” is defined in DCFR II.–1:101(2); the rules in DCFR Book III apply to all obligations, contractual or not, DCFR III.–1:102

Requirements for the conclusion of a contract are found in DCFR II.–4:101 (intention of legal effect and sufficient agreement)

Conclusion of a contract by way of offer and acceptance is regulated in DCFR II Chapter 4 Section 2 (a contract may be concluded in other ways as well)

Right of withdrawal is regulated in DCFR II Chapter 5 (this may be regarded as an exception to the binding effect of a contract)

11 Contract and conclusion of contract

Intention of legal effect and sufficient agreement are the requirements for the conclusion of a contract (DCFR II.–4:101, cf. 4:102 and 4:103)

No further requirement

Compare French law; requirements of object and cause:

Code Civil art. 1108:

“Four requisites are essential for the validity of an agreement:
The consent of the party who binds himself;
His capacity to contract;
A definite object which forms the subject-matter of the undertaking;
A lawful cause in the obligation.”

Compare English law; requirement of consideration: see e.g. Carlill v. Carbolic Smoke Ball Company [1893] 1 Q.B. 256

How intention is determined (DCFR II.–4:102) statement or conduct; subjective intention or objective appearance? (“as they were reasonably understood by the other party”)

Sufficient agreement (DCFR II.–4:103); it must be possible to enforce the contract

Exercise 3:

Group discussion and presentation in class

Mr. Brown, the owner of a restaurant, called the local plumber, Ms. Green, one evening, telling her that a water pipe was broken and that it must be fixed. “I will be there in half an
hour,” Ms. Green replied. When the plumber arrived at the restaurant, the piped was already
fixed by one of the waiters, and the plumber’s services were not needed. Ms. Green the
following week sent an invoice for 200 euro, which was her standard fee for emergency call-
outs. Mr. Brown refused to pay. He contended that there was no contract, at least no contract
for such an amount.

Discuss this case according to the DCFR and then according to your national law.

12 Offer and acceptance

Characteristics of an offer (DCFR II.–4:201); a promise conditional on acceptance; intention;
sufficiently definite

Offers to specific persons and public offers

Revocation of offer (DCFR II.–4:202); revocation reaches the offeree before the offeree has
dispatched an acceptance (see also “withdrawal” or “revocation” in DCFR I.–1:109(5))

Offers made to the public, DCFR II.–4:202(2)

Irrevocable offers, DCFR II.–4:202(3)

Compare CISG art. 16; UNIDROIT Principles art. 2.1.4

Compare national law (an offer may be generally revocable; an offer may be revocable, but
revocation may lead to liability; an offers may be generally irrevocable until it lapses)

Exercise 4:

Group discussion and presentation in class

Mr. Brown, still in the restaurant business, was looking for new furniture for the restaurant
and found a website belonging to Table & Chair, a producer of restaurant equipment. At the
website, café chairs were advertised at 20 euro apiece. In an e-mail to Table & Chair, Mr.
Brown ordered 100 chairs, referring to the advertisement. The sales manager of Table & Chair
immediately replied that the price was now 60 euro apiece. She explained that the website had
not been updated for the last couple of years (something that was clear from a “last updated”
information in small print at the bottom of the relevant page). The correct price could be
found in an advertisement in a recent issue of a restaurant business magazine; the 20 euro
price was a special introduction offer. Mr. Brown argued that Table & Chair was bound by its
offer.

Discuss this case according to the DCFR and then according to your national law

Preparation:


Prepare exercises 5–8

13 Right of withdrawal

Structure of rules on withdrawal in the DCFR; Book II Chapter 5 Section 1 on “exercise and effects”; Section 2 on “particular rights of withdrawal”

Effects of withdrawal, DCFR II 5:105; terminates the contractual relationship; restitutionary effects

Particular rights of withdrawal; DCFR III.5:201; consumer, off-premises, distance communication, timeshare; exceptions


Purposes of a right of withdrawal: time to reconsider (surprise effect of off-premises contracts, timeshare contracts, but also consumer credit contracts in general), chance to inspect goods (distance selling)

Complicated system of excepted contracts

Exercise 5:

Group discussion and presentation in class.

On Thursday, Mary bought a cinema ticket for Friday night through the cinema’s Internet service, paying with her credit card. She immediately received a confirmation by e-mail. A couple of hours later, she was invited for a week-end trip in the mountains. She called the cinema and revoked her offer to buy a ticket, asserting that an automatic reply was no sufficient acceptance. In any case, she wished to withdraw from the contract. The cinema’s representative replied that Mary was bound by the contract and had no right of withdrawal.

Discuss this case according to the DCFR.
14  Overview: Grounds of Invalidity

DCFR Book II Chapter 7 deals with two groups: vitiated consent or intention; infringement of fundamental principles or mandatory rules (see DCFR II.–7:101)

Lack of capacity is not dealt with in the DCFR (DCFR II.–7:101(2))

Impossibility does not lead to invalidity (DCFR II.–7:102)

Terminology, see Annex (Definitions) “avoidance”, “void”, and “voidable”

Vitiating consent or intention may lead to voidability (“a party may avoid ...”)

Infringement of fundamental principles may make a contract void (“a contract is void to the extent that ...”; “nullity”)

The effect of infringement of a mandatory rule may be prescribe by that rule or decided by a court (DCFR II.–7:302)

When a contract is void or avoided it is ineffective from the beginning (DCFR II.–7:212 and 7:303)

Return of what has been transferred or supplied is regulated by the rules on unjustified enrichment and by the rules on transfer of ownership (DCFR II.–7:212 and 7:303)

Nullity or avoidance may lead to a claim for damages (DCFR II.–7:214 and 7:304, see also 7:204)

We will concentrate on mistake

15  Mistake

Avoidance for mistake is regulated in DCFR II.–7:201

Mistake of fact or law existing when the contract was concluded (compare DCFR III.–1:110 on change of circumstances and DCFR III.–3:104 on excused non-performance)
Prerequisites:

<table>
<thead>
<tr>
<th><strong>Party wishing to avoid the contract:</strong></th>
<th><strong>The other party:</strong></th>
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<tbody>
<tr>
<td>motivation (would not have concluded the</td>
<td>knew or could reasonably be expected to</td>
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<tr>
<td>contract or would have done so on</td>
<td>know about such motivation; and</td>
</tr>
<tr>
<td>fundamentally different terms); and</td>
<td>caused the mistake; or</td>
</tr>
<tr>
<td>mistake was not inexcusable; and</td>
<td>knew or could reasonably be expected to</td>
</tr>
<tr>
<td>risk was not assumed or should not be</td>
<td>know about the mistake, left the mistaken</td>
</tr>
<tr>
<td>borne by that party</td>
<td>party in error contrary to good faith and fair</td>
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<td></td>
<td>dealing (“duty to inform”); or</td>
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<tr>
<td></td>
<td>failed to comply with pre-contractual</td>
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<tr>
<td></td>
<td>information duty; duty to make available</td>
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<tr>
<td></td>
<td>means of correcting input errors; or</td>
</tr>
<tr>
<td></td>
<td>made the same mistake</td>
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</table>

Inaccuracy in communication may be treated as mistake (DCFR II.–7:202)

**Exercise 6:**

**Group discussion and presentation in class**

Judy had some shares in a small company, Cutter Ltd., which produced lawnmowers. From a friend working in government offices, Judy learnt that a new tax could be expected on several sorts of equipment with petrol engines. Judy immediately sold her shares to her friend Thomas, explaining that she was in need of cash. A couple of weeks later, the tax was introduced, causing a sharp fall in the value of Cutter Ltd. Thomas, who like most people had not suspected such a tax, claimed his money back, but Judy refused.

Discuss this case according to the DCFR and then according to your national law.

**Exercise 7:**

**Group discussion and presentation in class:**

Paul and Pierre passed the window of a TV shop where they noticed a 30-inch flat-screen TV set displayed with a price tag of 200 euro. The two friends photographed the display before they entered the shop and ordered two TV sets at 200 euro each. The bewildered shop-keeper had a look at the display, immediately realised the mistake, and explained that the correct price was 2000 euro. Paul and Pierre insisted that they were entitled to have the TV sets at the displayed price.

Discuss this case according to the DCFR and then according to your national law.
Adaptation of contract in case of mistake (DCFR II.–7:203); one party may “accept” the other party’s mistake; the court may adapt the contract in case of common mistake

Liability for loss caused by reliance on incorrect information (DCFR II.–7:204); even if there is no right to avoid the contract

See also DCFR II.–9:102 on statements regarded as contract terms

The party may choose between pursuing invalidity and pursuing non-performance (DCFR III.–7:216)

Example: a seller has given incorrect information concerning the goods. The buyer may have a right to:

- avoid the contract (DCFR II.–7:201)
- have the contract adapted by the court in case of common mistake (DCFR II.–7:203(3))
- claim damages for loss caused by reliance, with or without avoiding the contract (DCFR II.–7:204)
- remedies for non-performance if the statement amounts to a contract term (DCFR II.–9:102, 7:216)

Exclusion of remedies by contract term; remedies for mistake may be excluded or restricted, but not contrary to good faith and fair dealing (DCFR II.–7:215(2))

16 Interpretation. Implied terms

General rules (DCFR II.–8:101); common intention; intention known to the other party; “meaning which a reasonable person would give to it”

Relevant matters (DCFR II.–8:102); circumstances (negotiations included); good faith and fair dealing

Compare in particular English law (negotiations and subsequent conduct of parties as a rule not taken into account)

Interpretation rules: interpretation against party supplying term or dominant party (DCFR II.–8:103); preference for negotiated term (DCFR II.–8:104); reference to the contract as a whole (DCFR II.–8:105); interpretation which gives terms full effect (DCFR II.–8:106); preference for original language version (DCFR II.–8:107)

Interpretation and implied terms: the DCFR distinguishes between on the one hand interpretation and on the other hand “terms ... derived ... from tacit agreement of the parties, from rules of law or from practices established between the parties or usages”, DCFR II.–9:101(1). Further, a court may exceptionally “imply an additional term”, II.–9:101(2) and (3)
17 Unfair terms


The directive and the proposal for a new directive are limited to non-negotiated terms; DCFR II.—9:403 has a possible expansion of scope to negotiated terms in business to consumer contracts

The directive and the DCFR have a “grey list” of terms that are presumed to be unfair in business to consumer contracts; the proposal for a new directive has in addition a “black list” of terms which are in all circumstances considered unfair

Duty of transparency (DCFR II.—9:402); “plain, intelligible language”

Definition of “not individually negotiated” (DCFR II.—1:110)

Meaning of “unfair”

business to consumer contracts (DCFR II.—9:403)

contracts between non-business parties (DCFR II.—9:404)

contracts between businesses (DCFR II.—9:405)

Exclusions for rules based on legislation etc.; “main subject matter” and price (DCFR II.—9:406)

Factors to be taken into account (DCFR II.—9:407)

Effects on unfair terms (DCFR II.—9:408); not binding on the party who did not supply it

Exclusive jurisdiction clauses (DCFR II.—9:409)

The “grey” list (DCFR II.—9:411)

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<td>Group discussion and presentation in class</td>
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Lisa bought an apartment in a house with eight apartments in total. The house was not constructed yet at the time when the contract was concluded, but the contract included a description of the apartment together with dimensioned drawings. When the apartment was finished six months later and Lisa was going to move in, it turned out that the ceiling had been lowered with thirty centimetres in part of the living-room because of a ventilation duct. Lisa found this ugly and considered it to be a lack of conformity. The seller referred to a clause in the contract allowing him to make “small alterations of the planned apartments if necessary due to technical reasons”. The ventilation system was not planned in detail at the time when the contracts were concluded, he explained. The seller asserted that there was no lack of conformity. In Lisa’s opinion, this contract term was unfair. She had not noticed the term in
the twelve-page contract document which was presented only at the meeting where she signed the document.

Should the term be considered unfair under the DCFR?

C Outline for Wednesday 27 January 2010. Remedies for Non-Performance. Transfer of rights and obligations. Overview of specific contracts

Preparation:


Prepare exercises 8–13

18 Overview of DCFR Book III

“Law of obligations”: general rules on obligations (contractual and non-contractual); performance; remedies for non-performance; plurality of debtors and creditors; transfer of rights and obligations; set-off and merger; prescription (limitation)

We will concentrate on remedies for non-performance and transfer of rights and obligations

19 Obligations and performance

Definitions in DCFR III.–1:101 of “obligation”, “performance”, “non-performance”, “reciprocal obligation” (the correlative of “obligation” is “right to performance”)

Terminology: the difference between “duty” and “obligation”

Good faith and fair dealing (DCFR III.–1:103); duty to act in accordance with good faith and fair dealing; effects of breach of such duty; “good faith and fair dealing” as objective standard of conduct (distinguished from “good faith” referring to knowledge)

Obligation to co-operate (DCFR III.–1:104)

Detailed rules in Book III Chapter 2 on place of performance, time of performance etc.

20 Non-performance, excuse, remedies

Remedies for non-performance are regulated in Book III Chapter 3

Enforcing specific performance and damages are not available if non-performance is excused due to an impediment (DCFR III.–3:101(3)); compare contract terms giving a party right to additional time or additional payment; if the impediment is permanent the obligation (and any reciprocal obligation) is extinguished (DCFR III.–3:104(4))

Compare rules on mistake (impediment existing at the time when the contract was concluded)
Compare rules on changed circumstances (DCFR III.–1:110); an obligation may be varied or terminated by the court (“hardship”)

Compare the distinction between obligation to achieve a specific result and obligation to make reasonable efforts; not regulated in the DCFR; compare UNIDROIT Principles 5.1.4

21 Excuse due to an impediment (DCFR III.–3:104)

Functions:

a permanent excusing impediment leads to extinguishment of the obligation and any reciprocal obligation; restitutionary effects are regulated in Book III, Chapter 3, Section 5, Subsection 4 (DCFR III.–3:104(4))

a temporary excusing impediment bars claims for enforcement of specific performance and claims for damages, but not other remedies for non-performance (DCFR III.–3:104(3), 3:101(2))

Prerequisites

impediment

beyond the debtor’s control

debtor could not reasonably be expected to have taken the impediment into account

debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences

Compare CISG art. 79

22 Other prerequisites for remedies

The creditor must not have caused the debtor’s non-performance (DCFR III.–3:101(3)); obligation to co-operate (DCFR III.–1:104)

Possible exclusion or restriction of remedies (DCFR III.–3:105); restriction concerning personal injury; good faith and fair dealing

Notification within reasonable time (DCFR III.–3:107)

Possible cure by debtor (DCFR Book III, Chapter 3, Section 2); the debtor as a rule has a chance to cure a lack of conformity (DCFR III.–3:202); limitations in DCFR III.–3:203

23 Right to enforce performance

Non-monetary obligations (DCFR III.–3:302); the creditor may as a rule enforce specific performance, including remedying of a lack of conformity; limitations (performance is unlawful or impossible, unreasonably burdensome, of a personal character); substitute transaction and damages
Compare English law: the main rule is that specific performance cannot be enforced

Monetary obligations (DCFR III.–3:301); the creditor is entitled to recover money; limitations are mainly a question of “cancellation” (damages instead of enforcement of agreed payment may be more favourable to the debtor)

**Exercise 9:**

Group discussion and presentation in class

Mr. Wilson, a farmer, ordered from Machine Industry Ltd. a machine for automatic packaging of the cheese he produced at his farm. The machine was to be produced according to Mr. Wilson’s specifications. Some days after the contract was concluded, Mr. Wilson was contacted by another factory that offered to produce a similar machine for just half the price. Mr. Wilson immediately informed Machine Industry Ltd. that he was not willing to receive the machine which he had just ordered. Machine Industry Ltd. protested and wished to produce the machine and recover the payment for it. The machine was still not put into production at the time of this correspondence.

Discuss this case according to the DCFR and then according to your national law.

### 24 Withholding performance

Right to withhold performance of reciprocal obligation (DCFR III.–3:401); creditor is to perform at the same time or after; creditor is to perform first (cases of anticipated non-performance)

Whole or reasonable part of the performance may be withheld

### 25 Termination for fundamental non-performance

Main rule: the creditor may terminate if the debtor’s non-performance is fundamental (DCFR III.–3:502)

Definition of “fundamental” non-performance (DCFR III.–3:502(2)); substantially deprives the creditor of what the creditor was entitled to expect (and foreseeability on debtor’s side); intentional or reckless non-performance (and aspects for future performance)

Termination after notice fixing additional time for performance (DCFR III.–3:503); reasonable period

Termination for anticipated non-performance (DCFR III.–3:504 and 505)

Termination of divisible obligations (DCFR III.–3:506(2))

Exercise of right to terminate (DCFR III.–3:507); notice to the debtor (court decision is not necessary)

Right to terminate must be exercised within a reasonable time (DCFR III.–3:508); note the “automatic” termination in case of permanent excusable impediment (DCFR III.–3:104(4))
Effects of termination

 outstanding obligations under the contract come to end (DCFR III.–3:509(1))

 return of benefits received (or value), DCFR III.–3:510; but not as far as conforming performance has been met with conforming performance (DCFR III.–3:511)

 payment of value of benefits for what is not returned (DCFR III.–3:512) and for use or improvements (DCFR III.–3:513)

 creditor retains right to damages (DCFR III.–3:509(3))

Exercise 10:

Group discussion and presentation in class

Summum Ius, a law firm, planned to invite the entire town for the celebration of the firm’s five-year anniversary and ordered food for 500 persons from a catering business to be delivered at fixed date (a Saturday). The event was properly announced in the local media. In the morning of the agreed day, Summum Ius received a phone call from the catering business: there was a serious problem with the internal electricity supply, and it was not possible to provide the food before Saturday afternoon. The representative of Summum Ius explained that the event would take place at noon, and she terminated the contract with immediate effect. All the disposable plates, cutlery etc. which the catering business had delivered on Friday would be returned and not paid for, she said. – The catering business did not agree with her on any of these points.

Discuss this case according to the DCFR and then according to your national law.

26 Price reduction

Right to reduce price (DCFR III.–3:601)

Proportionate reduction of price, typically for lack of conformity

Combination with damages

Exercise 11:

Group discussion and presentation in class

Bénédicte was looking for a small boat for leisure purposes and went to J. Flint, a dealer of new and second-hand boats. Bénédicte found a six-year old boat that she liked. The boat had a sign with “10 000 euro” on it, but she managed to beat the price down to 8000 euro. It turned out that the boat had a leakage, the repair of which cost 1000 euro. Bénédicte claimed that the price of the boat must be reduced with 1000 euro. Flint admitted that the leakage was a lack of conformity, but asserted that the correct price reduction in a case like this was 800 euro. Bénédicte did not agree.

Discuss this case according to the DCFR and then according to your national law.
27 Damages and interest

Structure

right to damages (non-performance which is not excused)

loss (economic and non-economic)

measure of damages

creditor’s contribution to the loss; duty to reduce the loss

Right to damages (DCFR III.–3:701(1)); non-performance which is not excused; no fault requirement; compare CISG; compare national systems

Loss (DCFR III.–3:701(2) and (3)); actual and future loss; including loss of income or profit; economic and non-economic loss

Measure of damages

general measure of damages (DCFR III.–3:702); comparison with due performance

foreseeability (DCFR III.–3:703); extended if non-performance is intentional, reckless, or grossly negligent

creditor’s contribution to the loss (DCFR III.–3:704); duty to reduce loss (DCFR III.–3:705); damages may be reduced; expenses incurred in attempting to reduce loss

substitute transaction (DCFR III.–3:706); measure of damages based on current price DCFR III.–3:707)

Interest; delay in payment of money (DCFR III.–3:708); the average commercial bank short term lending rate to prime borrowers

Stipulated payment for non performance (DCFR III.–3:710); stipulation in contract is valid; reduction if grossly excessive; compare in particular English law on liquidated damages and penalty clauses

Exercise 12:

Group discussion and presentation in class

The facts are the same as in exercise 10. Summum Ius as a “plan B”, in a hurry bought a lot of fruit, cakes and sweets in order to be able to serve the guests at least something. They had to pay twice as much for this as the price that was agreed for the food. Summum Ius now claimed damages for loss amounting to the difference between these prices. In addition they claimed damages for loss of reputation. The catering firm did not accept any liability.

Discuss this case according to the DCFR and then according to your national law.
28 Transfer of rights and obligations

Three types of transactions covered:

- assignment of right to performance of an obligation
- substitution and addition of debtors
- transfer of contractual position

All rights to performance are as a rule assignable (DCFR III.–5:105)

Substitution of new debtor and transfer of contractual position involve an agreement with the debtor (DCFR III.–5:201, cf. 5:301)

Transfer of negotiable instruments and certain registered rights not covered

29 Assignment of a right to performance of an obligation


Three groups of issues:

- relationship between assignor and assignee (contract or other juridical act)
- debtor’s position (discharge, defences, set-off)
- third parties’ position (assignor’s general creditors, assignee’s general creditors, successive assignees)

Relationship between assignor and assignee:

- undertakings by assignor (DCFR III.–5:112); the assignor undertakes that the assigned right exists, but not that the debtor has the ability to pay

- contractual prohibition of, or restriction on, assignment does not affect assignability (DCFR III.–5:108(1); no requirement of good faith

Debtor’s position

- contractual prohibition of, or restriction on, assignment (DCFR III.–5:108)

  - debtor may perform in favour of assignor;

    - but not if the assigned right is a right to payment for the provision of goods or services (“trade receivables”)

  - debtor retains the right of set-off against the assignor as if the right had not been assigned

  - assignor’s liability for breach unaffected
where there is no such contractual restriction

debtor is discharged by performing to assignor until notice of assignment; discharged also by performing to person identified as assignee in notice, even if that person is not the creditor (DCFR III.–5:119)

debtor may request proof of assignment (DCFR III.–5:120)

debtor may invoke defences which could have been invoked against the assignor (DCFR III.–5:116(1))

debtor may to a certain extent invoke a right of set-off which would have been available against the assignor (existing at the time of notice or closely connected with the assigned right), DCFR III.–5:116(3)

Third parties’ position

effective against the assignor’s general creditors without notice to debtor (DCFR III.–5:104(2))

successive assignees (DCFR III.–5:121); notification to debtor in good faith

Exercise 13:

Group discussion and presentation in class

Solness, a building constructor, was short of liquid funds and paid off his debt to creditor X by assigning his claim for payment under a construction contract with the municipality. The municipality was not notified of the assignment. A couple of weeks later, Solness paid off his debt to another creditor, Y, by assigning once more his claims under the same contract with the municipality. Creditor Y immediately notified the municipality of this assignment. Two months later, as Y was about to collect his money from the municipality, he was met by objections from creditor X, who asserted to be the creditor of the right of performance from the municipality. There were also other objections: the municipality asserted that the assignment was invalid due to a clause in the contract where Solness had accepted not to assign any claim under the contract. In any case, the municipality invoked claims for price reduction and damages under the contract for which the right of payment was assigned as well as under another contract with Solness where the work was finished the week before. Creditor Y did not accept any of these objections.

Discuss this case according to the DCFR.

30 Substitution of new debtor

With the agreement of both creditor and debtor a third party may be substituted as a new debtor, and the original debtor is discharged (DCFR III.–5:201)

31 Transfer of contractual position

Combination of assignment of rights and substitution of new debtor (DCFR III.–5:301)
32 Overview of specific contracts

Particular types of contracts (sale, lease, services, donation etc.) form central parts of European civil codes; this goes back to Roman law

Establishment of a general contract law through the principle of binding effects of contract (inspired by natural law, canon law)\textsuperscript{29}

English law: “in principle the law of contracts is the same for all contracts”.\textsuperscript{30} Particular contract types are, however, important in legislation and in books, cf. also “implied terms”

Categorisation of each contract; mandatory rules cannot be contracted out by “choosing” another contract type; party autonomy (parties may derogate from default rules; parties may also agree on a category); no \textit{numerus clausus} for contract types (“innominate” contracts are allowed)

Mixed contracts (DCFR II.–1:107); either “combination” (2) or “predominant” type approach (3)

Specific contracts dealt with in Book IV; see in particular the wide scope of Part C Services
